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IN THE
COURT OF APPEALS OF INDIANA

KELLY TRUCKING, INC.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 93A02-0801-EX-36
	)	
BRADLEY S. WILSON, STATE OF INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT, and U. I. REVIEW BOARD,	)	
	)	
Appellees-Petitioners.	)	

APPEAL FROM THE INDIANA UNEMPLOYMENT INSURANCE REVIEW BOARD
The Honorable Georgia C. McFarland, Administrative Law Judge
Cause No. 07-R-02843

June 18, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Kelly Trucking, Inc. ("Kelly Trucking"), appeals a decision by the Review Board of the Indiana Department of Workforce Development ("Board") granting unemployment benefits to Bradley S. Wilson. Kelly Trucking raises two issues, which we revise and restate as whether the Board's determination that Wilson was not terminated for good cause was reasonable. We affirm.

The facts most favorable to the Board's determination follow. Wilson was employed by Kelly Trucking as a truck driver. His employment ended on March 10, 2007, or March 13, 2007. Wilson applied for unemployment benefits, and a claims deputy found that he was not discharged for just cause. Kelly Trucking appealed the eligibility determination, and a hearing was held before an administrative law judge ("ALJ"). After the hearing, the ALJ entered findings of fact and conclusions thereon finding that Kelly Trucking had discharged Wilson without just cause and that Wilson was eligible for unemployment benefits. Kelly Trucking appealed the determination, and the Board remanded to the ALJ because the ALJ had failed to make sufficient findings of fact for the Board to review the decision. The ALJ then issued revised findings of fact as follows:

* * * * *

> The claimant worked for this employer from September 9, 2004 until March 13, 2007.
>
> The employer is a regional freight company employing four (4) full time and one (1) part time drivers. The claimant worked full time as a truck driver earning 40¢ per mile, plus a safety, attendance and production bonus, totaling approximately 5¢ per mile.

On Saturday, March 10, 2007 at 8:46 a.m. as the claimant was returning from a delivery in the Indianapolis, Indiana area, the employer phoned the claimant on his cell phone and told him that he had another load for him to pick up and to deliver in Indianapolis. The claimant told the employer that he was just about out of time on his log book. The employer told the claimant that he had customers calling and breathing down his neck and wanting things done. The claimant again reminded the employer that he was out of time in his logbook. The employer told the claimant that he was going to take an ad out in the paper and replace him and that he only had a few weeks left. The claimant told the employer, "Fine. I'll just talk to the DOT." (See Claimant Exhibit 1)

At approximately 9:22 a.m. on March 10, 2007 the claimant called a coworker, Steve. Steve told the claimant that Shawn Hanley called him and told him that he, the claimant, was fired and that he wouldn't go over his log book hours. Immediately after that another coworker, Marvin Jord[a]n, confirmed that Shawn Hanley told him that Brad Wilson is "no longer employed with us."

When claimant returned to the employer's facility he took his log books but did not take the rest of his belongings. The claimant was expected to turn his daily log sheets in to the employer, pursuant to DOT regulations. The claimant did not turn in his log books during the entire 2.5 years of his employment with this employer. The claimant believed that his employer didn't care . . . that all the employer wanted was to have all their deliveries made. The claimant regularly turned in his mileage reports. The claimant was paid by the mile. There was no evidence of the employer giving the claimant a warning for failing to turn in log books.

The claimant's log book records between March 5, 2007 and March 10, 2007 reflect that claimant had 57.25 hours of service. (Claimant Exhibit 8) Had claimant taken the delivery to Indianapolis he would be driving in excess of sixty (60) hours in a seven (7) day period.

Claimant was off of work on Sunday, March 11 and Monday, March 12, 2007. The claimant had a previously scheduled court date on March 12, 2007. The claimant did not come in to work until noon on Tuesday, March 13, 2007. Claimant knew he was going to have a conversation with the employer and wanted to have a witness. Before claimant went into work, his wife told him not to quit, that he had a couple of weeks left. Claimant needed health insurance. He had surgery three (3) weeks earlier. The claimant asked the employer if he was fired.

> The employer offered claimant his job back but that his rate was going to be cut and he would lose all of his bonuses.
>
> On two (2) prior occasions the employer threatened to put an ad in the paper and replace the claimant when the claimant refused a pickup or load when he was out of hours. In the first occasion the employer threatened to put an ad in the paper and terminate claimant's employment in two (2) weeks. The employer asked the claimant to stay on the two (2) weeks. Claimant did and nothing happened. In the second occasion the employer threatened to put an ad in the paper and replace the claimant in two (2) weeks, and the employer immediately cancelled the claimant's health insurance. The employer later reinstated the claimant's insurance and employment when the employer rehired the claimant.
>
> The testimony of the parties was in dispute. The Administrative Law Judge specifically finds that the testimony and demeanor of the claimant clearly shows that he had no intentions of concealing any material fact necessary to the proper adjudication of this case.

Appellant's Appendix at 11. The ALJ concluded that Wilson was not discharged for just cause. Specifically, the ALJ concluded that Kelly Trucking "terminated [Wilson's] employment when [Wilson] refused a load and told [Kelly Trucking] that he was out of hours" and that "[w]hen [Wilson] advised [Kelly Trucking] that he was just about out of hours and refused to take an additional load, [Wilson] was using his judgment in following DOT regulations." Id. at 12-13. The ALJ determined that Kelly Trucking had "failed to prove by a preponderance of the evidence a willful or wanton disregard of the employer's interests by [Wilson]." Id. at 13.

Kelly Trucking appealed the ALJ's decision to the Board. The Board issued a decision adopting and incorporating by reference the ALJ's findings of fact and conclusions thereon and affirming the ALJ's decision.

The issue is whether the Board's determination that Wilson was terminated for good cause was reasonable. The Indiana Unemployment Compensation Act provides that "[a]ny decision of the review board shall be conclusive and binding as to all questions of fact." Ind. Code § 22-4-17-12(a) (2004). However, Ind. Code § 22-4-17-12(f) provides that when the Board's decision is challenged as contrary to law, the reviewing court is limited to a two part inquiry into: (1) "the sufficiency of the facts found to sustain the decision," and (2) "the sufficiency of the evidence to sustain the findings of facts." McClain v. Review Bd. of Ind. Dep't of Workforce Dev., 693 N.E.2d 1314, 1317 (Ind. 1998), reh'g denied. The Indiana Supreme Court clarified our standard of review of the Board's decisions in McClain:

> Review of the Board's findings of basic fact [is] subject to a "substantial evidence" standard of review. In this analysis the appellate court neither reweighs the evidence nor assesses the credibility of witnesses and considers only the evidence most favorable to the Board's findings.
>
> The Board's conclusions as to ultimate facts involve an inference or deduction based on the findings of basic fact. These questions of ultimate fact are sometimes described as "questions of law." They are, however, more appropriately characterized as mixed questions of law and fact. As such, they are typically reviewed to ensure that the Board's inference is "reasonable" or "reasonable in light of [the Board's] findings." The term "reasonableness" is conveniently imprecise. Some questions of ultimate fact are within the special competence of the Board. If so, it is appropriate for a court to exercise greater deference to the "reasonableness" of the Board's conclusion . . . . However, not all ultimate facts are within the Board's area of expertise. As to these, the reviewing court is more likely to exercise its own judgment. In either case the court examines the logic of the inference drawn and imposes any rules of law that may drive the result. That inference still requires reversal if the underlying facts are not supported by substantial evidence or the logic of the inference is faulty, even where the agency acts within its expertise, or if the agency proceeds under an incorrect view of the law.

Id. at 1317-1318 (internal citations and footnotes omitted).

First, Kelly Trucking argues that the Board erred by relying upon the testimony of Marvin Jordan, which was stricken from the record. After striking the testimony, the Board then included the following in its findings of fact:

> At approximately 9:22 a.m. on March 10, 2007 the claimant called a coworker, Steve. Steve told the claimant that Shawn Hanley called him and told him that he, the claimant, was fired and that he wouldn't go over his log book hours. *Immediately after that another coworker, Marvin Jord[a]n, confirmed that Shawn Hanley told him that Brad Wilson is "no longer employed with us."*

Appellant's Appendix at 11 (emphasis added). Kelly Trucking is correct that the Board erred by relying upon Jordan's testimony.

"Error in the admission of evidence may be harmless when the evidence is merely cumulative of other properly admitted evidence." Witte v. Mundy ex rel. Mundy, 820 N.E.2d 128, 135 (Ind. 2005). The Board relied upon his testimony to show that Hanley told other employees that Wilson had been terminated. Wilson also testified that, on March 10, 2007, he called Steve Deon, an employee of Kelly Trucking. During that conversation, Wilson learned that Hanley, his supervisor, told Deon that Wilson had been fired.[1] Although the Board erred by relying upon Jordan's stricken testimony, the error

[1] Kelly Trucking argues that Jordan's stricken testimony was not cumulative because only Wilson testified that Hanley told other employees that he had been fired and Jordan's testimony added to Wilson's credibility. "Depending on the facts of a case, testimony that gives credibility to another witness's testimony may not be considered cumulative." In re Paternity of H.R.M., 864 N.E.2d 442, 451 (Ind. Ct. App. 2007). "[E]vidence is not cumulative when the other evidence tending to prove the same facts is clearly not persuasive and therefore requires further support." Id. In H.R.M., we concluded that the trial court abused its discretion by admitting a social worker's testimony and a family specialist's notes, both of which contained hearsay. Although the same allegations were included in the mother's responses to interrogatories, which were admitted at trial to show her ill will, bias, and motivation to

was harmless because Jordan's testimony was cumulative of other evidence. See, e.g., Witte, 820 N.E.2d at 136 (holding that, although the admission of testimony was erroneous, the error was harmless).

Kelly Trucking also argues that it did not terminate Wilson. In Indiana, an employee "who has voluntarily left the individual's most recent employment without good cause in connection with the work or who was discharged from the individual's most recent employment for just cause is ineligible" for unemployment benefits. Ind. Code § 22-4-15-1(a) (2004). Kelly Trucking argues that Wilson is not eligible for unemployment benefits because he quit his job "when faced with the choice of a reduction in bonus/optional incentive pay or leaving . . . ." Appellant's Brief at 10. Kelly Trucking concedes that Wilson and Hanley had differing versions of their conversations, but contends that Wilson's "stories were inconsistent, irrational, and in disharmony with the other highly credible evidence presented." Id.

The Board found that Wilson was more credible and gave credit to Wilson's version of the events. The Board found that Kelly Trucking fired Wilson when he refused to haul a load because he was out of hours. Our review of the record reveals substantial evidence to support these findings. Kelly Trucking's argument is merely a

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coach the child, we concluded that the evidence was not cumulative because "the allegations of a party-opponent hardly carry the same degree of reliability or weight as the testimony of a therapist or the purported records of a family care specialist." Id. at 451. Thus, we concluded that the error was not harmless. We find H.R.M. distinguishable. In H.R.M., the allegations of abuse found in the mother's responses to the interrogatories were "clearly not persuasive." Id. Here, the Board found that Wilson's testimony was credible and persuasive. The unusual circumstances of H.R.M. simply are not present here.

request that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do. McClain, 693 N.E.2d at 1317.

Alternatively, Kelly Trucking argues that it had just cause to terminate Wilson under Ind. Code § 22-4-15-1, which provides in part that "[d]ischarge for just cause" is: "(2) knowing violation of a reasonable and uniformly enforced rule of an employer; . . . (5) refusing to obey instructions; . . . or (8) . . . any breach of duty in connection with work which is reasonably owed an employer by an employee." Ind. Code § 22-4-15-1(d)(8). "When the authority of those in whom the employer has confided responsibility for day-to-day operations is flouted by an employee's willful disregard of reasonable directives, just cause for discharge of that employee exists." Graham v. Review Bd. of Indiana Employment Sec. Div., 179 Ind.App. 497, 501, 386 N.E.2d 699, 702 (1979).

Kelly Trucking contends that it terminated Wilson because he refused to turn in his daily hour logs, made a false mileage report, refused to haul the load on March 10, 2007, and used foul language when talking to Hanley on March 10, 2007. Kelly Trucking argues that the Board's findings on this issue are not supported by substantial evidence. Again, we note that the Board found Wilson more credible and gave credit to his version of the events. The Board rejected Kelly Trucking's arguments and found that it terminated Wilson because Wilson refused to haul a load when he was out of hours. Although Kelly Trucking contends that some of the Board's findings are contrary to the evidence, our review of the record reveals that the findings are supported by substantial

evidence.[2] Kelly Trucking's argument is, again, merely a request that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do. McClain, 693 N.E.2d at 1317. Given the findings of fact, we conclude the Board's determination that Wilson was not terminated for just cause is reasonable.[3]

For the foregoing reasons, we affirm the Board's decision that Wilson was not discharged for just cause.

Affirmed.

DARDEN, J. and NAJAM, J. concur

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[2] For example, Kelly Trucking contends that Wilson was not out of hours because they were operating on a 70 hour/8 day schedule rather than a 60 hour/7 day schedule. However, Hanley, production manager of Kelly Trucking, testified that they "[a]lmost . . . never" operate on a 70 hour/8 day schedule. Board's Supp. Appendix at 2. Wilson testified that they used the 60 hour/7 day rule and had never used the 70 hour/8 day rule. **(Transcript at 70-71)** The Board found Wilson more credible. Kelly Trucking's argument that the 70 hour/8 day rule applied is merely another request that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do.

[3] Kelly Trucking also argues that the ALJ was biased. **(Appellant's Brief at 9)** However, Kelly Trucking does not develop the argument or cite to authority. Consequently, the argument is waived. See, e.g., Loomis v. Ameritech, 764 N.E.2d 658, 668 (Ind. Ct. App. 2002) (holding argument waived for failure to cite authority or provide cogent argument), reh'g denied, trans. denied.